

NO. 48612-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PAVEL F. ZALOSH,

Appellant.

Appeal from Superior Court of Clark County
Honorable David Gregerson
NO. 12-1-01105-2

REPLY BRIEF OF APPELLANT

EDWARD PENOYAR, WSBA #42919
Attorneys for Appellant

Post Office Box 425
South Bend, Washington 98586
(360) 875-5321

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I. REPLY

- A. Respondent's Brief at (II) mistakenly argues that the value of the property stolen from the Powell and Lucaci homes was sufficiently established to support a conviction of Burglary in the Second Degree (above \$750) because no evidence was provided of the value of the property *in the area* as statutorily required.

RCW 9A.56.010(21) is unequivocal that "value" is the value [emphasis added] "at the time *and* in the approximate *area* of the criminal act." This creates a two-fold requirement for the State to prove beyond a reasonable doubt - (1) the value at the time of the criminal act, and (2) the value in the approximate area.

No evidence or testimony was provided at trial related to the "value in the approximate area." The Powells and Lucas's simply testified what they paid for the items and their estimate of current gold prices from some unidentified market, no evidence whatsoever was provided of the value of the items in the geographic area and therefore the statutory burden has not been met to satisfy a finding of Burglary in the Second Degree (above \$750).

- B. Respondent's Brief at (III) mischaracterizes the nature of the objection of defense counsel at trial and it remains clear that the trial court failed to undertake a 'thorough and careful' 3-part analysis of relevancy as required by *State v Jackson*.

Respondent's brief argues that Appellant fails to show that the trial court erred in admitting evidence because the defense objected only to relevancy at trial and did not make an ER 404(b) objection:

Here, Zalozh's only argument at trial regarding the evidence he now complains of was one of relevance. The trial court specifically confirmed his objection was one of relevance. RP 200. Now, on appeal, Zalozh challenges the propriety of the admission of this

evidence pursuant to ER 404(b). Zallozh did not challenge this evidence on this basis at the trial court level and thus it is not reviewable...

Respondent's Brief at 21.

Respondent's argument fails because an ER 404(b) objection *is* a relevancy objection. ER 404(b) is part of Title 4, which is entitled "Relevancy and Its Limits." Trial defense counsel's relevancy objection at the trial was an ER 404(b) objection regardless of whether counsel specifically stated as such. The objection was made precisely at the moment the State attempted to address "other crimes" and thus the trial court thus had a duty to conduct a *Jackson* analysis at that point. Furthermore, Respondent's brief does not mention the fact that trial defense counsel again objected *specifically* on ER 404(b) grounds in his brief post-trial. In *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007), the Supreme Court stated:

Mason argues the evidence showing he possessed these weapons violated ER 404(b)'s exclusion of evidence of "prior bad acts." The Court of Appeals made no ruling with respect to the application of ER 404(b); holding that his ER 404 challenge was not preserved because at trial Mason objected to the relevance of the weapons, not that the evidence should have been excluded as "prior bad acts." *State v. Kendrick*, 47 Wash.App. 620, 634, 736 P.2d 1079 (1987); *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985). Mason failed to object on the basis of ER 404(b); the Court of Appeals correctly ruled that the issue was not preserved for appeal.

The objection at trial in this matter is distinguished from *Mason* because defense counsel objected on relevancy grounds precisely at the moment the State was attempting to admit evidence of other crimes. Unlike *Mason* where it was ambiguous what the relevancy objection regarding the weapons meant, it was clear and unequivocal to the court that Zallozh's

relevancy objection could only have been with regards to ‘other crimes’ (ER 404(b)).

II. CONCLUSION

For the reasons set forth in Appellant’s opening brief and additional information contained herein, this court should reverse the conviction for residential burglary and theft of a firearm for insufficient evidence and remand the possession charge because there was insufficient evidence that it constituted possession in the second degree as its value was not sufficiently shown, or in the alternative, a new trial should be granted.

Respectfully submitted this 28th day of November, 2016.

/s/ Edward Penoyar

EDWARD PENOYAR, WSBA #42919
edwardpenoyar@gmail.com
Counsel for Appellant
P.O Box 425
South Bend, WA 98586
(360) 875-5321

CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

Anne Cruser
Clark County Prosecutor's Office
anne.cruser@clark.wa.gov
cntypa.generaldelivery@clark.wa.gov
pamela.bradshaw@clark.wa.gov

mailed, postage prepaid to the following on November 29, 2016:

Pavel Zalozh, DOC #353493
Airway Heights Corrections Center
PO Box 1899
Airway Heights, WA 99001-1899

DATED this 28th day of November, 2016, South Bend, Washington.


TAMRON CLEVENGER

EDWARD PENOYAR ATTORNEY AT LAW

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anne.cruser@clark.wa.gov

cntypa.generaldelivery@clark.wa.gov

pamela.bradshaw@clark.wa.gov

edwardpenoyar@gmail.com

tamron_penoyarlaw@comcast.net